United States Court of Appeals

for the Second Circuit

PETITION

74-1646

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 74-1646

PAN AMERICAN WORLD AIRWAYS, INC.,
TRANS WORLD AIRLINES, INC.,
Petitioners,

v.

CIVIL AERONAUTICS BOARD
Respondent,

NATIONAL AIR CARRIER ASSOCIATION,
Intervenor.

ON PETITION FOR REVIEW OF A
REGULATION OF THE CIVIL AERONAUTICS BOARD

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ON PETITION FOR REVIEW OF A
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BRIEF FOR RESPONDENT

COUNTERSTATEMENT OF THE ISSUE

The Civil Aeronautics Board has promulgated by rule-making methods a regulation which authorizes those air carriers already permitted to operate and organize travel group charters to operate and organize foreign-originating travel group charters in compliance with the applicable charter rules of the originating country, so long as (1) those

foreign rules conform to certain standards contained in the Board's regulations and (2) there is in effect a bilateral agreement between the originating country and the United States with respect to the charterworthiness of such operations. The question for decision on the merits is whether the standards enunciated by the Board are compatible with bona fide charter operations under the Federal Aviation Act.

COUNTERSTATEMENT OF THE CASE

In September 1972, the Board authorized a new type of charter service, called "Travel Group Charters" (hereinafter referred to as TGC's), to be operated by United States scheduled and supplemental (charter) air carriers and foreign air carriers holding certificates or permits under the Federal Aviation Act (Act).[1/] The TGC regulations were affirmed over the objections, inter alia, of these petitioners by the District of Columbia Circuit in Saturn Airways, Inc., et al. v. Civil Aeronautics Board, 483 F.2d 1284 (C.A.D.C., 1973).

Approximately one year later, on September 4, 1973, the Board instituted a public rulemaking proceeding to consider the amendment of the TGC rules to permit U.S. and foreign carriers to perform foreign-originating TGC's (hereinafter referred to as TGC/ABC's) organized in

1/ Regulations SPR-61 (37 F.R. 20802) and ER-761 through ER-767 (37 F.R. 20674-76).

compliance with the rules of the country or origin, so long as: (1) those foreign rules are substantially similar to our own; and (2) there is in effect, between the country of origin and the U.S., a formal agreement with respect to the charterworthiness of such operations.[2/] Thereafter, on March 15, 1974, the Board adopted the amendment as proposed.[3/] That amendment is challenged in this proceeding by two U.S. scheduled air carriers, Pan American World Airways (Pan Am) and Trans World Airlines (TWA). The member carriers of the National Air Carrier Association (NACA), a trade association of the U.S. supplemental carriers, have intervened herein in support of the Board's amendment.

A. General Background.

Several references to "charters" appear in the Federal Aviation Act. The supplemental air carriers' certificates, issued under Section 401(d)(3) of the Act, 49 U.S.C. 1371(d)(3) (infra, p. A-2), authorize them to engage only in "supplemental air transportation."[4/] This is defined in pertinent part as "charter trips . . . in air transportation" (Section

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2/ Notice of Proposed Rulemaking, SPDR-33, Appendix, B, infra.

3/ Regulation SPR-74 (A. 29a). All "A" cites are to the appendix filed by petitioner.

4/ The history of the supplemental air carrier industry has been discussed in several cases and need not be set forth in detail here. See Saturn Airways v. C.A.B., 483 F.2d 1284 (C.A.D.C. 1973) (the "TGC" case); Pan American World Airways v. C.A.B., 380 F.2d 770 (C.A. 2, 1967), aff'd by an equally divided court sub nom. World Airways v. Pan American World Airways, 391 U.S. 461 (1968) ("inclusive tour charter" case); American Airlines v. C.A.B., 365 F.2d 939 (C.A.D.C. 1966) ("inclusive tour charter" case); American Airlines v. C.A.B., 348 F.2d 349 (C.A.D.C. 1965) (the "split charter" case); United Air Lines v. C.A.B., 278 F.2d 446 (C.A.D.C., 1960); American Airlines v. C.A.B., 235 F.2d 845 (C.A.D.C. 1956); Great Lakes Airlines v. C.A.B., 293 F.2d 153 (C.A.D.C., 1961).

101(34), 49 U.S.C. 1301(34), infra, p. A-1). This same term appears in Section 401(e)(6) of the Act (49 U.S.C. 1371(e)(6)) which authorizes the scheduled air carriers to conduct off-route "charter trips." Generally speaking, the term charter is equally applicable to the operations of foreign air carriers holding permits issued under Section 402 of the Act (49 U.S.C. 1371) which authorizes either regular route operations (see Part 212 of the Board's regulations, 14 C.F.R. 212) or "charter" only operations (see Part 214 of the Board's regulations, 14 C.F.R. 214).

The term "charter is not defined by the Act and is thus subject to refined definition and regulation by the Board to maintain the basic distinction it denotes between group travel and individually-ticketed travel of the sort normally associated with scheduled point-to-point service. American Airlines v. C.A.B., 348 F.2d 349 (C.A.D.C., 1965); American Airlines v. C.A.B., 365 F.2d 939 (C.A.D.C., 1966); Pan American World Airways v. C.A.B., 380 F.2d 770 (C.A. 2, 1967), aff'd by an equally divided Court, 391 U.S. 461 (1968); Trans International Airlines v. C.A.B., 432 F.2d 607 (C.A.D.C., 1970); Saturn Airways v. C.A.B., 483 F.2d 1284 (C.A.D.C., 1974). As the District of Columbia Circuit said, in the first of the cited cases, Congress has left it to the Board to "evolve a [charter] definition in relation to such variable factors as changing needs ...." (348 F.2d at 354).

The evolutionary process has resulted in Board recognition of, or provision for, a variety of kinds of charters. There are "single-entity" charters which involve engagement of an aircraft by one person for the

transportation of others who pay nothing. A typical example would be the charter of an aircraft by an industrial concern to transport a group of its employees. There are charters in which a group charters an aircraft for its own use, each participant sharing equally in the cost. Such charters, in turn, have been available to groups having some prior "affinity" or community of interest apart from the transportation, e.g., members of a club or fraternal organization, and to "spontaneous" groups of persons who have no prior community of interest, e.g., people living in the same neighborhood or even people congregated at a cocktail party, and who band together for the purpose of travel. There are also inclusive tour charters (14 C.F.R. 378) which involve the charter of an aircraft by an entrepreneur who then offers space on the aircraft to the public as part of a one-price package which includes accommodations and other ground arrangements. 5/

Charter service is inherently less expensive to individuals than conventional service because the entire capacity of an aircraft is used and the costs can be spread among more passengers than in scheduled service, where planes usually fly with less than full planeloads and the costs are borne by fewer passengers. Over the years, the most widely used type of charter has been the pro rata charter by "affinity" groups. The Board's regulations contain numerous technical restrictions designed to insure that the participants are drawn from a bona fide club or organization existing for purposes other than travel, since in this type of charter such affinity is the tool utilized by the Board to

5/ There are also "study group charters" (14 C.F.R. 373) and "overseas military personnel charters" (14 C.F.R. 372).

maintain the distinction between group travel and individually-ticketed service (see 14 C.F.R. 207, 208, 212, 214).

As has been recognized in the courts, the "affinity" charters have "proven to be discriminatory in application and difficult in enforcement." Saturn Airways, et al. v. C.A.B. 483 F.2d 1284 (C.A.D.C., 1973). See also National Air Carrier Association v. C.A.B., 442 F.2d 862 (C.A.D.C., 1971). They tend to discriminate against members of the public who do not belong to qualified organizations with a membership large enough to successfully mount a charter program. Additionally, wide abuses of the affinity rules developed over the years; spurious organizations were frequently formed, composed of individuals, otherwise unrelated to one another, who were brought together, essentially at the time of flight, solely to pretend to conform to the rules under which low cost transportation was made available. The charter rules lacked common acceptance among passengers because it was not clear to them why the test for eligibility for low cost transportation was membership in a group which had nothing to do with transportation.

As a result of the problems inherent to "affinity" charters, the Board established TGC's, a charter service based upon eligibility requirements other than organization membership and designed to provide a "more appropriate means [of maintaining the distinction between charter and individual service] without departing from statutory requirements." (SPDR-22 at 4).

B. Travel Group Charters

The TGC rules were adopted by the Board on September 27, 1972.[6/] The basic idea of the TGC is that a group of 40 or more persons may contract with an air carrier to hire all or part of an aircraft for round-trip transportation for a trip lasting at least seven days in North America and at least ten days elsewhere in the world. Under the rules, the cost of the trip is borne by the charter participants on a pro rata basis. TGC's are arranged by a "charter organizer," defined as one engaged in the formation of the group and who acts as the group's agent with respect to the contract with the air carrier; and who is regulated as an "indirect air carrier." Detailed provisions are contained in the regulations governing the formation of travel groups and the transportation involved which are designed to maintain a distinction between group and individually ticketed travel.[7/]

6/ The rules were promulgated as Part 372a of the Board's Regulations (14 C.F.R. 372a).

7/ Persons joining the travel group will enter into a contract with the organizer authorizing him to enter into the charter contract with an air carrier as their agent, and to enter their names on one of two lists he will compile for each charter: The "main list" and the "standby list." The "main list members" are those who have paid at least an initial deposit of 25 percent of the minimum pro rata charter price specified in the proposed charter contract. "Standby list members," on the other hand, are those who want an opportunity to be substituted on the trip for a "main list participant" who might withdraw or default. No person whose name does not appear on the main or standby lists as of three months prior to departure date may actually participate in the flight.

The 25 percent deposit of main list participants becomes nonrefundable three months prior to the scheduled flight departure date (except in the case of death or illness preventing the travel). Thereafter, if a main list participant finds himself unable to make the trip, he can only recover his deposit if his interest can be assigned to a person on

(Footnote continued)

Several scheduled carriers, including Pan American and TWA challenged the TGC rules in the District of Columbia Circuit, contending that the new charter was merely a guise for individually ticketed services. On July 11, 1973, the Board's rules were affirmed. Saturn Airways v. C.A.B., 483 F.2d 1284 (C.A.D.C., 1973). In rejecting Pan American's and TWA's contention, the Court concluded that the TGC rules "maintain the necessary distinction between group and individually ticketed travel, and that they are the result of painstaking and reasoned analysis by the Board." In so doing, the Court recognized that "organization membership" is not necessary to insure the distinction between individually ticketed and charter services, and "is not a sine que non for legality." (483 F.2d at 1293).

Footnote continued--

the standby list. While this can be done at any time up to the scheduled flight date, not more than 20 percent of persons on the main list may do so. In other words, of those actually participating in the flight, at least 80 percent must be drawn from the main list of persons who have made a nonrefundable 25 percent deposit.

As we have shown, the main list participant must take a 25 percent deposit at the time his name is placed on the list. The balance is due 60 days prior to departure date. Also as previously indicated, this is based on the "minimum pro rata charter price" which is simply an amount equal to the total charter cost for all seats covered by the charter contract divided by the maximum number of charter participants plus the organizer's service charge. However, if a participant should default, or a refund should be made by reason of death or illness, and no assignee from the standby list could be found (or no assignment could be made because the maximum number of assignments had already been made), it would be necessary to increase the pro rata price of each remaining participant to cover the deficiency. Thus, not later than 45 days prior to flight time, the organizer must compute an "adjusted pro rata price" based on any defaults and refunds. If this should result in increasing the pro rata share of the remaining participants, they would have to pay the increase unless the increase should exceed 20 percent of the minimum pro rata price, in which event the charter would be cancelled.

C. Events preceding the amendment of the TGC rules.

There are at least two jurisdictions involved with respect to each flight in international air transportation, i.e., the United States and the foreign nation to which the traffic is destined or at which it originates. Consequently, the regulatory authority of one nation necessarily can be exercised only with the acquiesence of the other nation. As a result, there is an obvious need for cooperation, coordination and mutual agreement regarding the regulation of scheduled and charter services among the countries involved in international air transportation.

The concern about traditional affinity rules which had motivated the Board to adopt the TGC regulations had been shared for some time by the regulatory authorities of many foreign governments, and a few had for some time been considering adoption of novel "non-affinity" rules differing to some extent from the TGC rules which the Board had proposed and adopted. During the pendency of rule making proceedings culminating in the adoption of the TGC rule, several U.S. and foreign air carrier participants had argued for the adoption of special rules with respect to foreign-originating TGC's, so as to permit such charters to be operated in conformance with the originating country's rules governing TGC's (or their counterparts, however designated), so long as the foreign country's rules were substantially similar to those ultimately prescribed by the Board (SPDR-33, at 3, App. B at B-3). However, at the time the Board adopted the TGC rule, no foreign government had theretofore moved to implement comparable charter regulations,

"and the Board therefore considered it premature to attempt then to prescribe standards for determining whether another country's future rules would be substantially similar to ours." (SPDR-33, at 4, App. B at B-4). At the same time, however, the Board did "express agreement in principle with the merits of the proposed 'law of the country of origin' approach and indicated its willingness to deal with the matter later, in light of future developments in the international air transportation community, and to take appropriate implementing action -- by amending our rules, granting waivers, or otherwise -- giving due consideration to the interests of the public and the various competing classes of carriers." (Ibid.).

Following the Board's adoption of its TGC rules the United Kingdom announced its intention to adopt an Advance Booking Charter (ABC) rule, embracing a comparable concept. Shortly thereafter, representatives of the governments of the United States, Canada, and the 20 member states of the European Civil Aviation Conference (ECAC), met in Ottawa, Canada, and in October 1972, issued a joint Declaration of Agreed Principles for North Atlantic Charter Flights (Ottawa Principles). The Ottawa Principles were developed as a means to establish, during a period of experimentation with non-affinity charter concepts, "a generally agreed framwork which will permit all North Atlantic states to establish similar charter rules with respect to the new non-affinity class of air charters that will facilitate and regularize their operation on North Atlantic air routes." (Department of State Press Release No. 296, December 1, 1972, quoted in SPR-74, A. 5a). For its part, the Department of State in announcing

acceptance by the United States of the Ottawa Principles, stated as follows:

> "Adherence to the Declaration signifies our intention to permit the operation to and from the United States of foreign originating charters marketed under national rules consistent with the Declaration but differing from our pro-rata regulations. To this end, we are prepared to undertake discussions with other interrelated authorities, at an appropriate early date, to arrive at [a] mutually agreeable regime for particular bilateral flows and to ensure fully reciprocal treatment for U.S.-originating TGC flights." (Ibid.)

Within a short time after the inter-government agreement, a number of foreign governments adopted their own charter regulations, based upon the Ottawa Principles, incorporating restrictive features similar, but not identical, to the U.S. TGC rules. Moreover, in accordance with the intendment of the Ottawa Principles, bilateral agreements were soon concluded between the United States, on the one hand, and the United Kingdom, the Netherlands, the Federal Republic of Germany, France, and Ireland, on the other (SPDR-74 at 5, A. 6a). Each bilateral agreement provides that both signatory parties will accept as "charterworthy" traffic "originated in the territory of the other party" and organized and operated "pursuant to the advance charter (TGC or ABC) rules of that party." (Ibid.). The bilateral agreements with France, the Federal Republic of Germany and the United Kingdom further provide that the United States undertakes that its regulatory authorities will "[b]egin and conclude, as soon as practicable, rule making procedures to implement acceptance of the advance booking charter (ABC) rules" of

the other party (Ibid.).

D. The proceeding before the Board.

In light of the multi-lateral and bilateral agreements, the Board instituted a public rulemaking proceeding on September 4, 1973, to consider the amendment of the present TGC rules so as to authorize U.S. and foreign scheduled and supplemental carriers to perform foreign-originated TGC's or advance-booking charters (TGC/ABC's) organized in compliance with the rules of the country of origin, so long as: (1) those foreign rules are substantially similar to ours, and (2) there is in effect, between the country of origin and the United States, a formal agreement with respect to the charterworthiness of such operations." (SPDR-33 at 6, infra App. B at B-6). In the Notice of Proposed Rulemaking, the Board "tentatively concluded that, in order, for a foreign country's rules to be considered substantially similar to our own, they must embody, at a minimum," the following conditions and restrictions (SPDR-33, infra, App. B at B-7):

> "(1) The participants in each TGC/ABC group must travel together on both the outbound and inbound portions of the trip.
>
> "(2) Each TGC/ABC contract must cover at least forty seats.
>
> "(3) The list of actual participants (i.e., persons contractually bound to pay for a specifically identified flight) in each TGC/ABC group must be filed with appropriate regulatory authorities at least ninety days in advance of flight departure.
>
> "(4) If there is to be a list of 'standbys' (i.e., eligible substitutes for participants) for a TGC/ABC, and if the cost of the TGC/ABC is prorated among participants, then the number of such standbys shall not exceed three times the number of participants; but if the cost to individual TGC/ABC participants is not prorated, then the number of standbys shall not be greater than the number of seats contracted for.

"(5) No person shall be added to a standby list within ninety days prior to flight departure.

"(6) If the cost of the TGC/ABC is prorated among participants, then standbys may be substituted for participants at any time prior to flight departure; but if the cost to individual TGC/ABC participants is not prorated, then standbys may not be substituted for participants within thirty days prior to flight departure.

"(7) If the cost of the TGC/ABC is prorated among participants, then no more than twenty percent of the participants in any TGC/ABC group may be persons whose names were included on the standby list for that TGC/ABC flight; but if the cost to individual TGC/ABC participants is not prorated, then no more than fifteen percent of the number of seats contracted for may be sold to persons whose names were on the standby list relating to such flight.

"(8) A TGC/ABC must be 'round-trip' (i.e., including both a departure and return flight).

"(9) If the cost of the TGC/ABC is prorated among participants then a TGC/ABC must be for a minimum duration of at least seven days in the case of North American charters, and a minimum duration of at least ten days in the case of all other charters; but if the cost to individual TGC/ABC participants is not prorated, then during the period of April 1 to October 31, the TGC/ABC must provide for a minimum duration of at least fourteen days and during the period of November 1 to March 31, the minimum duration must be at least 10 days: Provided, however, that the minimum duration of non-prorated North American TGC/ABC's need not be greater than seven days.

"(10) If the cost of the TGC/ABC is prorated among participants, then commingling of TGC/ABC groups with other categories of charter traffic is permitted, but if the cost to individual TGC/ABC participants is not prorated, then no commingling of TGC/ABC groups with other categories of charter traffic shall be permitted.

"(11) The direct air carrier shall maintain a list of the passengers actually carried on each TGC/ABC flight."

The Board noted that while the proposed amendment does not require that participants bear a pro rata share of the charter costs and includes some conditions which are less restrictive than those which it had imposed on U.S.-originating TGC's, "other [conditions] are included which are

more restrictive than those presently contained in" the Board's TGC rules. Viewed as a whole, it "tentatively concluded" that the cumulative effect of the various proposed restrictions would "maintain'the necessary distinction between group and individually ticketed travel . . . .'" (SPDR-33 at 8, App. B at B-8).

In instituting the rulemaking proceeding, the Board also underscored the reason for amendment of the inbound charter rules (SPDR-33 at 8, App. B at B-8) (Ibid.):

> "In reaching our conclusion to modify the inbound charter rules, we have given great weight to the fact that the pro rata characteristic of our TGC rule appears to be unacceptable to a number of foreign governments for charters originating in their territory. Our insistence on this one requirement, regardless of the country of origin or the flag of the carrier, could thus result in effectively aborting the TGC experiment. Moreover, as a general principle, we are mindful that the international aviation system cannot maintain its viability if every government rigidly insists on imposing its own regulatory concepts on other sovereign states. Our approach here, which is designed, as a matter of comity, to recognize the validity of rules of foreign governments for charters originating in their territory, while maintaining our own rules for charters originating in this country, represents a reasonable accommodation of the divergent viewpoints of various sovereign members of the international aviation community in dealing with a common problem."

In response to SPDR-33, comments were received from numerous United States and foreign scheduled and supplemental air carriers. In sum, the U.S. scheduled carriers opposed the proposed amendment to the TGC rules while the supplemental and foreign carriers supported it.

Essentially, the U.S. trunklines contended that the proposed rules would abolish restrictions necessary to distinguish TGC's from individually ticketed services and would therefore be illegal insofar as they would apply to supplemental carriers. The trunklines voiced particular concern (1) that the proposed amendment does not require that inbound TGC/ABC participants must bear a pro rata share of the total cost of the charter; (2) that TGC/ABC participants are not necessarily required to pay nonrefundable deposits; and (3) that there is not necessarily a risk of flight cancellation up to 45 days prior to scheduled departure because of defaults by fellow charter participants.

In contrast, the supplemental and foreign air carriers argued that the requirements of the proposed amendment were sufficient to maintain the distinction between group and individually ticketed services. Indeed, most of the carriers contended that the amendment was too restrictive and urged the Board to eliminate some of the proposed limitations.[8/] Moreover, several carriers also warned that unless regulations were adopted to permit the performance of foreign-originating charters in substantial accord with the laws of the country of origin, many European governments were likely to retaliate by denying entry to U.S.-originating TGC flights and thus foreclosing all possibility for the development of charter services not based upon organzation membership.

8/ In particular, certain carriers sought the elimination of the requirement that the "participants in each TGC/ABC group must travel together on both the outbound and inbound portions of the trip." Some also objected to the restriction against the commingling of non-prorated TGC/ABC's with any other type of charter on the same aircraft.

On March 15, 1974, upon consideration of the filed comments, the Board adopted the TGC/ABC rules as proposed in the notice of rulemaking. The Board concluded the the "restrictions and conditions we are specifying with respect to foreign-originated ABC's [are] not normally incidents of individually ticketed service, and the cumulative effect of the set of restrictions adequately precludes the use of TGC/ABC charters as a guise for individually ticketed service." (SPR-74 at 11, A. 12a). In particular, the Board pointed to the following four restrictions which are not a part of individually ticketed service (Ibid.):

> "(a) the participants in each TGC/ABC group must travel together on both outbound and inbound portions of the trip. No such restriction is ordinarily required of individually ticketed travelers.
>
> "(b) At least ninety days in advance of flight departures, TGC/ABC participants are contractually bound to pay for a specifically identified flight. This is not a characteristic of individually ticketed travel.
>
> "(c) A TGC/ABC must be a 'round trip,' including both a departure and return flight. An individually ticketed traveler normally has a choice between purchasing a one-way or round-trip ticket.
>
> "(d) There is a minimum-stay requirement for TGC/ABC participants, a requirement not generally imposed on individually ticketed travelers."

The Board also addressed itself to the trunklines' contention that the amendment was deficient in not requiring that inbound TGC/ABC participants bear a pro rata share of the total cost of the charter (SPR-74 at 12, A. 13a):

> "This factor has never been considered a sine que non of charters. Even though the presence of this factor in a charter rule goes a long way toward indicating that the statutory distinction is being preserved, the absence of a pro rata feature hardly establishes the converse. Indeed except for outbound TGC's and prior affinity charters, none of the other types of charters which air carriers and foreign air carriers are authorized to perform require all participants to share equally the total charter cost or to make up the shares of defaulting participants."

Moreover, the Board pointed out that the amendment imposes several restrictions on TGC/ABC's which do not contain a pro rata requirement in addition to those imposed on charters operated under rules which do contain a pro rata requirement (Ibid.):

> "For example, in such cases, the minimum-stay limitation for charters outside of North America will be 14 days during the peak season (instead of 10 days); the permissible number of standbys cannot exceed the number of seats contracted for (instead of three times the number of participants); standbys cannot be substituted for participants within 30 days of departure (instead of at any time prior to departure); the number of passengers whose names were on the standby list cannot exceed 15 percent of the number of seats contracted for (instead of 20 percent of the participants); and the TGC/ABC, if it is a split charter, cannot be combined on the same aircraft with other categories of split charters."

It further emphasized that the effect of these additional restrictions is to assure that, "on an overall basis, the different sets of restrictions applicable to either situation will be comparably stringent." (SPR-74 at 13, A 14a).[9/]

9/ With regard to the scheduled carriers' complaints as to the absence of requirements that advance deposits be forfeited or that flights be

(Footnote continued)

Finally, the Board noted that the trunklines contention was entirely inconsistent with the conclusions of many foreign governments which have traditionally followed policies of preserving the distinction between individually ticketed and supplemental air transportation:

> "[W]hile no other country operates within precisely the same statutory framework as the United States, all of the other countries which joined in subscribing to the Ottawa principles share a common interest in preserving the distinction between group and individually ticketed air service. Typically, each of these countries has its own national-flag scheduled carrier (in many cases government owned) whose interests its government at all times strives to advance and protect. Where these countries also have charter-only carriers (usually privately owned), the governments limit such carriers to a subordinate or supplementary role as a matter of long-established policy even if not as a matter of explicit statutory requirement; and the governments of countries not having their own charter-only carriers similarly limit the authority they grant the charter-only carriers of other countries, including the U.S. supplemental carriers. . . .Thus, in asking us to conclude

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cancelled under certain circumstances, the Board noted that

> "organizers of foreign-originating TGC/ABC's will undoubtedly, in their own economic interest, include in participants' contracts provisions for required times of payment, partial or complete forfeiture in the event of default or change of plans, cancellation of the charter under certain circumstances, and so forth. The foreign ABC rules do not in general forbid such contract provisions; they simply do not mandate them as does our TGC rule." (SPR-74, at p. 9, A. 10a).

> that sets of restrictions which comport with the Ottawa principles and our proposed rule for foreign-originating charters nevertheless fail to preserve the essential distinction between individually ticketed and supplemental air transportation, the Trunkline Carriers are asking us to conclude that a considerable number of foreign governments, including many of the leading powers in the international aviation community, either have completely mistaken the problem or have abandoned their long-held policies of preserving the foregoing distinction. We cannot subscribe to any such conclusion." (Footnote omitted) (SPR-74, at 13-14, 14a-15a).

Accordingly, the Board amended its regulations to provide that the TGC/ABC rule be made effective on April 22, 1974, and foreign-originating charters are now being operated pursuant to the amendment.

ARGUMENT

Introduction

The Board's regulation is a form of redefinition of "Travel Group Charter" (TGC) for application to only those charters which originate in a foreign nation which has entered into an agreement with this nation for reciprocal charter flights and serves as a standard for determining whether the foreign nation's charter rules are sufficiently akin to the TGC rules applicable to United States originating charters to warrant the reciprocal recognition. The applicability of the regulation depends upon the existence of an international agreement with the foreign nation involved, and the standards set forth in the regulation do not necessarily reflect all of the requirements which a given foreign nation may impose upon TGC's which originate in its territory. Moreover, it was promulgated by "rulemaking" methods rather than on the basis of an evidentiary record. Accordingly, a threshold question is presented of whether direct review of the regulation in this Court is authorized by Section 1006 of the Federal Aviation Act, the statutory provision for review of Board "orders." 10/

10/ The rulemaking procedures followed by the Board are the same as those upheld by the District of Columbia Circuit in Saturn. They are not challenged in this proceeding.

Although a regulation which has the impact of an "order" may be subject to judicial review as an "order" under certain circumstances (see Columbia Broadcasting Co. v. United States, 316 U.S. 407 (1942)), Section 1006 of the Act (49 U.S.C. 1486) has heretofore been construed not to encompass regulations which are not issued on the basis of an evidentiary record. See, e.g., Arrow Airways, Inc. v. Civil Aeronautics Board, 182 F.2d 706 (C.A.D.C., 1950), cert. denied, 340 U.S. 828; Civil Aeronautics Board v. American Air Transport, Inc., 201 F.2d 189

(Footnote continued)

Assuming arguendo that the Court will entertain the petition for review, we subsequently show that the Board's regulations are lawful since they preserve the requisite distinction between group and individually ticketed travel even if there are no additional limitations imposed by the nation of origin. Indeed, the petitioners' contentions to the contrary rest upon (1) a thinly veiled attempt to relitigate in this Court the issue of whether travel group charters are lawful despite the resolution of this issue against them in the Saturn case and (2) contentions that the decision in Saturn established that the only TGC type charters which lawfully may be authorized are those which embody the precise restrictions which

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Footnote continued--

(C.A.D.C., 1952), certificate dismissed, 344 U.S. 4 (1952). In an apparent change from past interpretations of Section 1006, however, the District of Columbia Circuit has recently provided review of a regulation in circumstances in which no factual dispute was involved and the question of the propriety of the regulation was ripe for review. Deutsche Lufthansa Aktiengesellschaft v. Civil Aeronautics Board, 479 F.2d 912 (C.A.D.C., 1973). In light of the Lufthansa decision, we assume that had petitioners sought review of the instant regulation in the District of Columbia Circuit, the Court would have entertained their petition as it had done in the Saturn case. We note, however, that Saturn is not dispositive of the jurisdictional question presented here since, among other things, it involved the license of charter organizers by exemption order issued pursuant to Section 101(3) of the Act (49 U.S.C. 1301(3)), and such orders have always been reviewable pursuant to Section 1006 even in the absence of evidentiary hearings. See, e.g., Eastern Air Lines, Inc. v. Civil Aeronautics Board, 185 F.2d 426 (C.A.D.C., 1950).

which were before the District of Columbia Circuit in that case. We believe that the petitioners are not entitled to relitigate the basic issue of the lawfulness of TGC's, and that the instant regulation fully comports with the Saturn standards. 11/ Nonetheless, if the Saturn issues are to be reexamined here, we subsequently show that the Board's standards are fully in accord with the charter concept embodied in the Federal Aviation Act.

I. The TGC/ABC amendment fully comports with the TGC concept upheld in the Saturn decision.

As discussed in the counterstatement, the TGC regulations adopted by the Board in September 1972 -- which authorized both U.S. and foreign direct air carriers to provide air transportation in connection with both foreign and U.S. originating TGC's subject to compliance with various conditions and restrictions -- were affirmed by the District of Columbia Circuit in Saturn Airways v. C.A.B., 483

11/ In Pan American World Airways v. Civil Aeronautics Board, 380 F.2d 770 (C.A. 2, 1967), aff'd by an equally divided court, 391 U.S. 461 (1968), the Board argued that this Court should not consider the question of whether "inclusive tour" charters fall within the statutory concept of charter for reason that the District of Columbia Circuit had decided that issue. The Court rejected the contention on grounds that the earlier District of Columbia Circuit decision was concerned exclusively with the legality of domestic "inclusive tour" charters, while the case before this Court solely involved certificate amendments authorizing supplemental carriers to perform "inclusive tour" charters between points in the United States and foreign points. In contrast, the Saturn case involved the lawfulness of TGC's irrespective of whether performed in domestic or foreign air transportation, and the present amendment cannot be separated from the basic TGC regulation. Thus the rationale on which the Pan American decision was based is not present here.

F.2d 1284 (C.A.D.C., 1973). In Saturn, the Court recognized that "charter" is not defined by the Act, nor does it have a "fixed meaning." On the contrary, it is a broad and flexible concept denoting a distinction between group travel and "individually-ticketed" travel; and so long as this distinction is not breached, the Board may lawfully "'evolv[e] a [charter] definition in relation to such variable factors as changing needs ....' American Airlines, Inc. v. C.A.B., 348 F.2d 349, 354 (D.C. Cir. 1965)." Saturn Airways, supra, 483 F.2d at 1287. With that standard in mind, the Court found that the TGC concept constitutes a lawful evolution of the charter definition. It stated that it was impressed with several "'substantial and vital' differences between TGC's and conventional travel that have been stressed by the Board in its argument before us," and concluded that such differences effectively "maintain the necessary distinction between group and individually ticketed travel." 12/

12/ The Court specifically noted the following five differences between TGC's and conventional travel:

> "(1) The TGC traveler is a party to the charter contract itself, incurring liability for the pro rata share of the charter cost and running the risk that his cost may increase depending upon the load factor ultimately achieved. (2) The travel group must be formed no less than three months prior to the scheduled departure time, or the trip must be cancelled. (3) The members of the group formed in #2 above must have paid a deposit of 25 percent of the minimum pro rata charter price before the time for filing the list of tour members with the Board has elapsed, no more than four nor less than three months prior to the scheduled departure. This deposit is, subject to certain

(Footnote continued)

Petitioners' position is essentially that by permitting foreign-originating TGC/ABC's where the regulations of the country of origin are only substantially in accord with the Board's TGC regulations, the challenged amendments authorize a form of charter service which fails to maintain the "substantial and vital" differences from conventional service noted in Saturn Airways. They point out that under the TGC/ABC amendments (1) charter participants are not required to be a party to the charter contract itself, incurring liability for the pro rata share of the charter costs; (2) that TGC/ABC participants are not necessarily required to pay non-refundable deposits; and (3) that there is not necesaarily a risk of flight cancellation up to 45 days prior to scheduled departure because of defaults by fellow charter participants. The petitioners argue that such restrictions were indispensable, and the remaining restrictions and conditions specified in the TGC/ABC amendment are "not sufficient to provide any practical basis for differentiation between the sale of individually ticketed transportation and the sale of charter transportation."

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> exceptions, non-refundable. Payment of the balance must then be made not later than two months before departure. As of then the participant risks, again subject to certain exceptions, a 100 percent forfeiture should he desire to change his plans. (4) There is a risk of cancellation of the flight up to 45 days prior to scheduled departure by fellow charter participants. (5) All TGC participants must go and return as a group, subject to predetermined, fixed restrictions as to the length of the trip." 483 F.2d at 1292.

In affirming the TGC regulations, however, the District of Columbia Circuit did not hold in Saturn Airways that each of the TGC restrictions specifically noted were necessary to maintain the distinction between TGC's and individually ticketed services. Rather, the Court's focus was upon the cumulative effect of the entire set of restrictions, and the Court simply listed certain factors and restrictions which contributed to its ultimate determination. While the TGC/ABC amendment eliminates certain restrictions which the Board imposes on U.S.-originating TGC's and which were noted by the Court in Saturn, the amendment maintains other TGC restrictions, and as the Board pointed out (SPDR-33 at 8, App. B, infra) includes some new conditions "which are more restrictive than those presently contained in" the Board's TGC rules. 13/ Viewed as a whole, we submit

13/ The subject amendment imposes several restrictions on non-prorated TGC/ABC's that are not imposed on charters operated under the present TGC rules. While the minimum stay limitation for charters outside of North America is 10 days for peak season TGC's and TGC/ABC's, the peak season requirement for non-prorated TGC/ABC's is 14 days. Likewise, while the permissible number of standbys on TGC flights is three times the number of participants, the TGC/ABC amendment requires that the number of standbys cannot exceed the number of seats contracted for. Similarly, the TGC rules permit standbys to be substituted for main list participants at any time prior to departure, while the TGC/ABC rules prohibit substitution within 30 days of departure. Further, the number of passengers whose names were on the standby list cannot exceed 20 percent of the number of seats contracted for under the TGC rules and 15 percent under the TGC/ABC restrictions. Again, while the TGC rules permit the commingling of participants, the TGC/ABC, if it is a split charter, cannot be combined on the same aircraft with other categories of charter traffic.

that the various restrictions and limitations imposed in the Board's regulation maintain "substantial and vital" differences between TGC/ABC service and conventional service available to the individual traveler.[14/] These distinctions include the following:

1. At least 90 days in advance of flight departure, TGC/ABC participants are contractually bound to pay for a specifically identified flight. Individually-ticketed travelers, on the other hand, need not incur any contractual obligation prior to the flight. They are free to reserve when they please, change their reservations to another flight at any time, and cancel when they please.

2. There are other substantial restrictions which limit passenger flexibility. For one thing, all TGC/ABC participants must go and return together as a group. Further, there can be no intermingling of passengers from different groups and no one-way passengers.

14/ Clearly, the TGC restrictions which are not required for TGC/ABC's are not indispensable. The requirement that participants bear a pro rata share of charter costs is not a prerequisite for legality. Indeed, as the Board noted, "except for outbound TGC's and prior affinity charters, none of the other types of charters which air carriers and foreign air carriers are authorized to perform require all participants to share equally the total charter costs or to make up the shares of defaulting participants" (SPR-74 at 12, A. 13a). By the same token, mandatory deposit forfeitures and charter cancellations are not a requirement of other types of charters. Moreover, charter organizers remain free under TGC/ABC regulations to impose deposit, forfeiture and cancellation clauses on charter participants. And, as the Board emphasized, charter organizers, "will undoubtedly, in their own economic interest, include in participants' contracts provision for required times of payment, partial or complete forfeiture in the event of default or change of plans, cancellation of the charter under certain circumstances, and so forth" (SPR-74 at 9, n. 6a, A. 10a).

Moreover, TGC/ABC participants are subject to predetermined fixed restrictions on the length of their trips. In sharp contrast, no restrictions need be placed on an individually-ticketed traveler. Such passenger has a choice between purchasing a one-way or round trip ticket. He need not be "locked" into any specified length of stay or date of return. The individually-ticketed passenger can cut short his trip, extend it, make up his mind when to return after he reaches his destination, or decide not to return at all.

3. The TGC/ABC restrictions necessitate a significant risk of flight cancellation up to the date of departure. Each TGC/ABC contract must cover at least forty seats and generally will involve a substantially greater number. Participants must be drawn exclusively from the list of "actual participants" (persons contractually bound to pay for a specifically identified flight at least ninety days in advance of flight departure) or the list of "standbys" (eligible substitutes for participants formed not less than 90 days in advance of the flight whose number cannot exceed the number of seats contracted for on non-prorated TGC/ABC flights).[15/] If substantial numbers of participants default or cancel and cannot be replaced by "standbys," the charterer can choose to cancel the

15/ The TGC/ABC restrictions prohibit standbys to be substituted for persons on the "actual participant" list within 30 days of departure. Further, the number of standbys cannot exceed 15 percent of the number of seats contracted for.

flight rather than incur a financial loss on the charter. Thus, while the TGC/ABC rules do not mandate flight cancellation under specified circumstances, neither do they forbid contractual provisions authorizing cancellations. In contrast, the individually-ticketed passenger faces no such uncertainty.

Various faults are found with the above restrictions by Pan Am and TWA. Thus, the trunklines debunk the advance booking requirement, stating that most passengers "plan their trips" over 90 days in advance (Pet. Br. 12-13). Regardless of when a traveler "plans" his trip, however, the fact is that few passengers make reservations that far in advance, and most would avoid a particular flight if it were to have such an advance booking requirement.

Again, the trunklines scorn the length-of-stay requirements stating that most individually-ticketed transatlantic passengers stay abroad longer than the minimum required under the TGC/ABC restrictions (Pet. Br. 13). The individually-ticketed passenger, however, is free to go for as short or as long a period as he pleases and to change his plans. Indeed, even under the excursion fares offered by the trunklines at a discount on the ground that length of stay justifies granting a discount from regular economy fares, the individually-ticketed passenger has a choice of staying from 14-21 days or from 22-45 days. No such flexibility is available for the TGC/ABC participant.

Demonstrating such fallacies is perhaps answer enough to the objections to the restrictions on TGC/ABC's, but the objections are infected with a more fundamental error. It consists in a failure to view the restrictions in their totality. When this is done, it is, we submit, impossible to say that TGC/ABC's are not fundamentally different from conventional scheduled service or unlike the TGC rule upheld in the Saturn case.

II. Even if the Board's regulation is to be examined independent of the determination in Saturn, it nonetheless is lawful.

In arguing against the validity of the subject regulations, the petitioners advance many of the same arguments against the TGC concept which were presented in the Saturn case and rejected by the District of Columbia Circuit. Thus, they again contend (1) that TGC type operations are outside the charter concept contemplated by Congress; (2) that charter participants may not be solicited from the general public; and (3) that TGC's are not "supplemental" air transportation under the Act. While, as discussed supra, it is our position that the District of Columbia Circuit's rejection of the challenge to the TGC concept is dispositive of these questions, we shall nevertheless address ourselves to them.

A. The basic distinction between charter and individually-ticketed service requires merely that the charter service must differ in significant respects from conventional scheduled service.

The term "charter trip" has been in the statute since its enactment as the Civil Aeronautics Act of 1938. Thus, as previously indicated, Section 401(e)(6) and its predecessor authorized the scheduled carriers to perform off-route "charter trips and special services." Prior to 1962, however, the Act contained no definition of supplemental air transportation and no specific provision for Board authorization of carriers to perform it. As early as 1955, however, the Board found, as a congressional committee later described it, that the public interest required authorization of carriers "to perform supplemental air transportation of a kind and character which does amount to a conventional, frequent, route-type service as provided by the major airlines." S. Rep't No. 1567, 86th Cong., 2d Sess., p. 5 (1960) (emphasis added). [16] On the basis of this determination, the Board authorized a number of carriers (thereafter to be called "supplemental air carriers") to perform charter service. [17] In

16/ The Board's decision came in the Large Irregular Air Carrier Investigation, 22 C.A.B. 383 (1955).

17/ This the Board defined in pertinent part as "air transportation performed ... where the entire capacity of one or more aircraft has been engaged for the movement of persons ... on a time, mileage, or trip basis ... by a person (no part of whose business is the formation of groups ... or the solicitation or sale of transportation services) for the transportation of a group of persons ... as agent or representative of such group....." The Board excluded from its definition of charter "services ... offered by a carrier to individual members of the general public, or ... performed ... under an arrangement with a person ... who provides or offers to provide transportation to the general public ...." 22 C.A.B. at 884-885.

addition it authorized regular scheduled service by those carriers, subject, however, to numerical restrictions on the number of flights per month between any two points.

The Board originally authorized these operations by an exemption order under Section 416 of the Act (49 U.S.C. 1386). On review, the D.C. Circuit reversed, holding that the Board's findings were inadequate to support an exemption. American Airlines v. C.A.B., supra, 235 F.2d 845. For present purposes, it is sufficient to take note of the Court's observation that, by reason of the authorization to provide scheduled service, the supplementals "are moved much closer to the certificated services," i.e., the conventional services of the route-type carriers such as the trunklines.

A stay of the Court's mandate permitted the operations authorized by the exemption to continue pending Board determination of the question whether they should be certificated under Section 401. This the Board answered in the affirmative in 1959 (Large Irregular Air Carrier Investigation, 28 C.A.B. 487 (1959)), but the D.C. Circuit again reversed, hodling that the statute forbade authorization of scheduled service subject to quantitative limitations. United Air Lines v. C.A.B., supra, 278 F.2d 446.

It was thus that Congress took the "supplemental-air-carrier problem" in hand in 1962.[18/] This ultimately culminated, as shown

18/ As a first step, stop-gap legislation was enacted maintaining the status quo until Congress could study the matter in depth and pass permanent legislation. Act of July 14, 1960, 74 Stat. 527.

above, in amendment of the Act so as to define supplemental air transportation as "charter trips in air transportation" and to empower the Board to issue certificates of public convenience and necessity authorizing such transportation.

As all agree, this legislation reflected a decision by Congress that the supplementals should no longer be permitted to perform "individually-ticketed" service. 19/ The full significance of that determination, however, is elucidated by the context in which it was made. The supplementals were at that time performing regularly-scheduled service which, but for the quantitative restrictions, was identical to conventional trunkline service. Thus, there were no requirements that participants be contractually bound to pay for a specific flight well in advance of the flight departure or that advance deposits be paid. Nor were there any mandatory round-trip or minimum stay restrictions much less requirements that passengers travel as part of a specific group. In other words, as matters then stood, an individual desiring to go from A to B could consult the published schedules of one or more supplementals operating between A and B, as well as those of trunklines serving the same points, choose the carrier and flight he pleased, pay the fare, and fly the same day. As Senator Monroney was to say several years later in a

19/ Provision was made for special authorizations to engage in individually-ticketed service in certain limited circumstances. See Section 417, 49 U.S.C. 1387.

related context, it was possible to "walk ... down with your checkbook in hand, or your credit card, and say ... 'Give me a trip to Stockholm.'" [20/] This was the "individually-ticketed service" the supplementals were providing when Congress determined that they should no longer provide it. [21/]

While foreclosing further individually-ticketed service by the supplementals, Congress agreed with the Board that these carriers have an important place in the air transportation system. Their role, it said, was to provide charters. This term it elected not to define, leaving it, as previously indicated, to the Board to "evolve a definition in relation to ... changing needs ...." American Airlines v. C.A.B., supra, 348 F.2d 349, 354. [22/] It did not, however, leave the Board without guidance. The Board was not to permit individually-ticketed service in the guise of a charter. To this end Congress decreed that, whatever definition the Board evolved, a charter must

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20/ Hearings before the Aviation Subcommittee of the Senate Committee on Commerce on S.3566, 90th Cong., 2d Sess., p. 95 (June 12 and 13, 1968).

21/ Moreover, as was documented at length in American Airlines, supra, 365 F.2d 939, some supplementals had utilized their individually-ticketed authority in a manner which circumvented the quantitative restrictions, a practice which Congress intended to put to an end.

22/ As discussed in detail infra, the legislative history of the 1968 amendment clarifying the supplemental legislation to expressly indicate that supplemental carriers possess the authority to perform ITC's further evidences a Congressional recognition of the Board's freedom to evolve its own charter definitions.

be a "different sort of service from individually-ticketed transportation." S. Rep't No. 688, 87th Cong., 2d Sess., p. 14 (1961).

What emerges from this is perfectly clear. The supplementals were at that time performing services several of which were qualitatively the same as the every-day services of the trunklines. This was to cease and, to insure against evasion of the congressional intent that it cease, any definition of charter evolved by the Board must contain elements which make the charter a "different sort of service" from what they had been providing under their individually-ticketed authority. The touchstone, then, of the distinction between the two is simply that charter service must be "of a kind and character which does not amount to conventional ... service as provided by the major airlines" (S. Rep't No. 1567, supra.).

As discussed in the previous section, restrictions and limitations inherent in the TGC concept make TGC's and TGC/ABC's significantly "different sort[s] of service" from normal individually-ticketed transportation. This was the test applied by the District of Columbia Circuit in the Saturn case, and nothing more was or is now required.

B. The legislative history of the supplemental legislation shows that charter participants may properly be solicited from the general public.

Petitioners argue that the supplemental legislation "prohibits charters from being solicited, either directly or indirectly, from

the general public." (Br. 8-9). In support of the contention, petitioners note that during the floor debate leading to enactment of the supplemental legislation in 1962, certain members of Congress expressed the view that the legislation would exclude from the charter concept any arrangement under which one could charter an aircraft from a supplemental and thereafter resell the space to individuals or solicit the general public to buy the space. Petitioners further note that some of such statements were relied upon in Pan American World Airways v. C.A.B., 380 F.2d 770 (C.A. 2, 1967), wherein this Court held that the supplemental legislation did not permit the Board to authorize the performance of "inclusive tour" charters.[23/] The TGC concept involves solicitation of the general public. Accordingly, the argument follows, the subject TGC/ABC amendment does not constitute charter transportation under the Act.[24/]

23/ "Inclusive tour" charters involve the charter of an aircraft by an entrepreneur who then offers space on the aircraft to the public as part of a one-price package which includes accommodations and other arrangements.

24/ The argument is at odds with Board practice quite apart from TGC's. The Board permits freight forwarders to charter aircraft (International Freight Forwarders Investigation, 27 C.A.B. 658, 668 (1958)), and also permits supplementals to perform charters of commercial traffic for scheduled carriers in cases of emergency (14 C.F.R. 208.6(a)(1)).

The foregoing argument necessarily presumes that the District of Columbia Circuit erred in its determination that TGC's were not unlawful. Saturn Airways, supra.[25/] There, the Court found that organization "affinity" or other restrictions or public solicitation were "not statutorily required, but only a vehicle to ensure that charter travel did not become a guise for individually ticketed service" (483 F.2d at 1293). Contrary to petitioners' presumption, however, the Saturn decision was proper, and events subsequent to the 1962 supplemental legislation have established that Congress did not intend to preclude public solicitation by charterers.

Notwithstanding the individual statements of various members of Congress with respect to charter and public solicitation, the Board authorized the supplementals to engage in inclusive tour charters in 1966. Supplemental Air Service Proceeding, Order E-23350 (March 11, 1966). Although the ITC's, as they are called, involved the chartering of an aircraft and solicitation of the general public by the charterer, the Board held them to be charters within the meaning of that term in the 1962 amendment of the Act. Using the test previously described, the Board said:

> "The use of the charter mechanism, combined with the restrictions which we are imposing by regulation, necessarily results in a service to the public which is different in significant respects from that available on scheduled services" (Order E-23350, Mimeo, p. 11, emphasis added).

25/ Public solicitation is an inherent aspect of TGC's.

Rejecting trunkline reliance on the statements of various members of Congress in 1962 indicating a contrary view, the District of Columbia Circuit affirmed, holding that ITC's were a permissible definition of the term "charter" in the 1962 amendment. American Airlines, supra. In so holding the Court stressed that the restrictions the Board had placed on ITC's would prevent the evils feared by those who had spoken against charter and public solicitation by the charterer; that the restrictions did result in a kind of service different from conventional airline service; and hence that ITC's "comport with the overall statutory intention of Congress" (365 F.2d at 948).

A year later this Court reached the opposite conclusion relying primarily on the statements which had failed to sway the District of Columbia Circuit. Pan American World Airways v. C.A.B., 380 F.2d 770 (C.A. 2, 1967), aff'd by an equally divided Court sub nom. World Airways v. Pan American World Airways, 391 U.S. 461 (1968).[25/] When the equal division of the Supreme Court failed to resolve the conflict,[26/] Congress promptly took the matter in hand

25/ It should be emphasized that this Court's conclusion was directed exclusively to the legality of ITC's. The Court relied upon statements of individual members of Congress directed specifically to ITC's and the action of the Conference Committee in eliminating a provision in the Senate bill which would have expressly permitted "all-expense-paid tours."

26/ An affirmance by an equally divided Supreme Court is not "entitled to precedential weight." Neil v. Biggers, 409 U.S. 188, 192 (1972).

by amending the definition of "supplemental air transportation" to include ITC's. In so doing, it emphasized that the Board's power "is clarified, not enlarged." 27/ Thus, in effect concurring with the decision in American Airlines, supra, 365 F.2d 939, it was the judgment of Congress that the Board had had the statutory power to authorize ITC's all along. Stated differently, what Congress said was that the 1962 statements of individual members of Congress upon which the petitioners rely did not reflect the intent of Congress and that public solicitation was not inconsistent with the term "charter" in the definition of supplemental air transportation so long as the service was different in significant respects from conventional airline service. 28/

27/ See S. Rep't No. 1354, 90th Cong., 2d Sess. 2 (1968): "S.3566 would clarify Congress intent," and 8: "The bill would reaffirm the previous position taken by this committee that inclusive tour charter trips are in the public interest and that supplemental air carriers should have the authority to conduct them." See also H. Rep't No. 1639, 90th Cong., 2d Sess. 2 (1968): "The bill would amend the Federal Aviation Act of 1958 ... to clarify Congress' intent that inclusive tour charter trips do not permit individually ticketed service by supplemental air carriers ...." and 4: "The CAB's authority is clarified, not enlarged here." These excerpts from the Senate and House Committee reports were noted in Saturn Airways, supra. 483 F.2d at 1291.

28/ Several aspects of the legislative history of the "ITC amendment" are of more than passing interest in this respect. Senator Monroney, the Senate manager, made it clear that the 1962 statements of his colleagues and their opposite numbers in the House did not reflect the intent of Congress: "I would be less than fair if I didn't say ... having been chairman of the conference committee ..., that contrary to the statements of the Members of the House at the time the bill was passed and some of our own colleagues, supplementals were not prohibited from the business of all inclusive tours ... The bill was intended to give the CAB authority to decide that." Senate Hearings

(Footnote continued)

The statements in question were in terms addressed to inclusive tours, yet Congress made it unmistakably clear that it had not proscribed authorization of ITC's. A fortiori, they do not suggest an intent to proscribe a charter definition which had not yet evolved, nor does anything else in the legislative history of the supplemental legislation. On the contrary, the 1962 and 1968 Acts and their legislative history clearly demonstrate that the Board remains free to "evolve a definition in relation to ... changing needs" (American Airlines v. C.A.B., supra, 348 F.2d at 354) subject only to the requirements that it involve group travel which differs in significant respects from conventional scheduled service.

Footnote continued--

on S.3566, supra, p. 78. Senator Cannon associated himself with these comments, adding that his colleagues "were not speaking for me" and that "all we did was to leave that question open for the Board to decide ...." (id., at p. 86).

Also of note are Senator Monroney's comments regarding the scheduled carriers' assertions that ITC's involve individually-ticketed service: "I ... must ... disagree that this bill has anything to do with individually-ticketed traffic. This is an assumption which seems to be part of a creed that your scheduled airlines have adopted." (id., at p. 90); "This has nothing to do with individual ticketing .... It is a lot different from walking down with your checkbook in hand, or your credit card, and saying: 'Give me a trip to Stockholm'" (id., at 95).

C. The TGC service will "supplement" scheduled service within the meaning of the Act.

Pan Am and TWA contend (Br. 14-17) that TGC/ABC's are not "supplemental air transportation" because, so they say, they do not "supplement the scheduled service authorized by certificates of public convenience and necessity" held by the trunklines (Section 101(34)). The only reason given is that foreign-originated TGC/ABC service "competes directly with petitioners' scheduled services."

The short answer is that there is nothing in the statute which precludes competition between the supplementals and the scheduled services or which relegates the supplementals to types of service or traffic which the scheduled carriers are unwilling or unable to provide or serve. The supplemental industry achieved its place in the transportation system through competition with the scheduled carriers, principally through their charter services. As the legislative history of the 1962 legislation more than proves, Congress was not only aware of this but intended that the supplemental industry grow and prosper. Manifestly, this did not mean that they are to live on the leftovers from the scheduled carriers' table. By ordinary dictionary definition, to "supplement" is merely to "add" and thus, any charter service which is found to be a valuable adjunct to the overall transportation system is supplemental regardless of the fact that it may compete with the scheduled carriers. 29/

29/ Petitioners claim that certain statements in the Saturn case lend support to their position (Br. 14-15). They overlook, however, that the statements were made in the context of the Court's conclusion that TGC's are a proper supplemental service. Moreover, there is nothing in the Saturn case or the quoted statements to indicate that the supplemental carriers are to be relegated to non-competitive services.

Moreover, as the Board has pointed out "the announced policy of the United States is that both scheduled carriers and supplemental carriers should be permitted a fair opportunity to compete in the bulk transportation market" (SPR-61, p. 11). The reference was to the "Statement of International Air Transportation Policy," approved by the President on June 22, 1970 (App. C, infra), a statement which the courts have recognized as bearing on the correctness of Board decisions involving relationships between the supplemental and scheduled air carriers. See e.g. National Air Carrier Association v. C.A.B., 442 F.2d 862 (C.A.D.C., 1971). The statement goes on with respect to the "bulk transportation market":

> "We consider passengers traveling at group rates on scheduled services to be part of that market. Regulatory and promotional policies should give greater recognition to the dimensions, characteristics and needs of the bulk transportation market, as such, and less emphasis to the type of carrier that is serving that market. However, the Government should not allow enjoyment of the right to perform both scheduled service and charter service to result in decisive competitive advantages for scheduled carriers."

Moreover, it has long been recognized that the declaration of policy in the Act which, of course, illumines all provisions of the Act, embodies "a national policy which contemplates the 'existence of a market structure conducive to maximum feasible competition'" between scheduled and supplemental air carriers.[30/] Thus, the fact that

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30/ National Air Carrier Association, supra, 442 F.2d at 874.

there will be competition between them does not make foreign-originating TGC/ABC's "non-supplemental," any more than the existing competition renders the supplementals' outbound TGC's or its other charter services illegal.

Furthermore, there is absolutely no evidence that the TGC/ABC amendment will cause any significant diversion of traffic from the scheduled services. For one thing, while the vast majority of traffic flown by U.S. scheduled and supplemental carriers originates in the United States the subject TGC/ABC's are limited exclusively to foreign-originating traffic. Moreover, most of the restrictions which have in the past prevented TGC's from diverting traffic (i.e. minimum stay requirements, risk of flight cancellation, contractual obligations 90 days in advance of flight) are present in the TGC/ABC amendment and will undoubtedly serve to protect the scheduled services. 31/

In light of this, there is no basis for the contention regarding the "supplemental" character of the Board's limited TGC/ABC amendment. The policies of the Act clearly support the view that the requirements of Section 101(34) of the Act that the charter services "supplement

31/ It should be noted that the petitioners do not attempt to show that the TGC/ABC amendment would result in the diversion of significant traffic from scheduled services.

scheduled service" permits the Board to authorize charter services which it finds are a valuable adjunct to the overall system. That TGC/ABC's fill this bill is just as clear. Charter service is inherently less expensive than scheduled because of the economies of planeload operations. Equally clear is that public demand for the less expensive service which these economies make possible is inexorable. The TGC charter concept enables individuals who are not members of "affinity" groups or organizations to obtain the benefits of charter transportation. And the TGC/ABC amendment, in permitting the performance of foreign-originating flights marketed under national rules similar to our own, effectively "ensure[s] fully reciprocal treatment for U.S. originated TGC flights" (SPR-74 at 4, A. 5a) and thereby prevents the valuable TGC concept from being aborted.

Moreover, it should be emphasized that all carriers, including the two petitioners herein, can derive substantial benefits from TGC and TGC/ABC operations. The new form of charter has the potential to generate substantial traffic from potential travelers for whom conventional scheduled service is prohibitively expensive, and with such traffic generation would undoubtedly come additional revenues and improved utilization of existing aircraft for all carriers. Thus, the subject amendment would ultimately benefit the public and scheduled and supplemental carriers alike. As the Court noted in

the Saturn case:

> "[T]he consistent lamentations and predictions of doom raised by the scheduled air carriers in the past have proved, to our way of thinking, to be considerably overstated. The actions of the Board in this area have provided for steady growth in both the scheduled and supplemental markets, and the public, as it should be, has been the primary benefactor." (483 F.2d at 1291-92).

CONCLUSION

If the Court entertains the petition, the Board's regulation should be affirmed.

Respectfully submitted,

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Dated: October 4, 1974

APPENDIX A

Relevant provisions of the Federal Aviation Act of 1958, 72 Stat. 731, 49 U.S.C. 1301 et seq.:

TITLE I -- GENERAL PROVISIONS

DEFINITIONS

Sec. 101. [72 Stat. 737, as amended by 75 Stat. 467, 76 Stat. 143, 82 Stat. 867, 49 U.S.C. 1301]. As used in this Act, unless the context otherwise requires -

* * * * *

(33) "Supplemental air carrier" means an air carrier holding a certificate of public convenience and necessity authorizing it to engage in supplemental air transportation.

(34) "Supplemental air transportation" means charter trips, including inclusive tour charter trips, in air transportation, other than the transportation of mail by aircraft, rendered pursuant to a certificate of public convenience and necessity issued pursuant to section 401(d)(3) of this Act to supplement the scheduled service authorized by certificates of public convenience and necessity issued pursuant to sections 401(d)(1) and (2) of this Act. Nothing in this paragraph shall permit a supplemental air carrier to sell or offer for sale an inclusive tour in air transportation by selling or offering for sale individual tickets directly to members of the general public, or to do so indirectly by controlling, being controlled by, or under common control with, a person authorized by the Board to make such sales.

* * * * *

TITLE IV -- AIR CARRIER ECONOMIC REGULATION

Certificate of Public Convenience and Necessity

Certificate Required

Sec. 401. [72 Stat. 754, as amended by 76 Stat. 143, 82 Stat. 867, 49 U.S.C. 1371]. (a) No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation.

* * * * *

Issuance of Certificate

(d)(3) In the case of an application for a certificate to engage in supplemental air transportation, the Board may issue a certificate, to any applicant not holding a certificate under paragraph (1) or (2) of this subsection, authorizing the whole or any part thereof, and for such periods, as may be required by the public convenience and necessity, if it finds that the applicant is fit, willing, and able properly to perform the transportation covered by the application and to conform to the provisions of this Act and the rules, regulations, and requirements of the Board hereunder. Any certificate issued pursuant to this paragraph shall contain such limitations as the Board shall find necessary to assure that the service rendered pursuant thereto will be limited to supplemental air transportation as defined in this Act.

* * * * *

(e)(6) Any air carrier, other than a supplemental air carrier, may perform charter trips (including inclusive tour charter trips) or any other special service, without regard to the points named in its certificate, or the type of service provided therein, under regulations prescribed by the Board.

* * * * *

JUDICIAL REVIEW OF ORDERS

Orders of Board and Secretary of Transportation subject to Review

Sec. 1006. [72 Stat. 795, as amended by 74 Stat. 255, 75 Stat. 497, 49 U.S.C. 1486] (a) Any order, affirmative or negative, issued by the Board or Secretary of Transportation under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act, shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

* * * * *

SPDR-33

APPENDIX B

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Special Regulations
Docket No. 25854
Dated: September 4, 1973

PART 372a - TRAVEL GROUP CHARTERS

AUTHORIZING AMENDMENTS

NOTICE OF PROPOSED RULE MAKING

Notice is hereby given that the Civil Aeronautics Board proposes to amend Part 372a of its Special Regulations (14 CFR Part 372a) so as to authorize certificated air carriers and foreign air carriers to perform foreign-originating travel group charters organized in compliance with the rules of the country of origin, so long as: (1) those foreign rules are substantially similar to Part 372a, and (2) there is in effect, between the country of origin and the United States a formal agreement with respect to the charterworthiness of such operations. The purpose of the proposed amendment is explained in the attached Explanatory Statement, and the proposed amendment is set forth in the Proposed Rule. The amendment is proposed under the authority of section 101(3), 204(a), 401, 402, 407, 416 and 1102 of the Federal Aviation Act of 1958, as amended, (72 Stat. 737 (as amended by 75 Stat. 467, 76 Stat. 143, 82 Stat. 867, 84 Stat. 921), 743, 754, 757, 766, 771, and 797; 49 U.S.C. 1301, 1324, 1371, 1372, 1386, and 1502).

Interested persons may participate in the proposed rule making through submission of twelve (12) copies of written data, views or

arguments pertaining thereto, addressed to the Docket Section, Civil Aeronautics Board, Washington, D. C. 20428. All relevant material received on or before October 10, 1973, will be considered by the Board before taking final action on the proposed rule. Copies of such communications will be available for examination by interested persons in the Docket Section of the Board, Room 712 Universal Building, 1825 Connecticut Avenue, N.W., Washington, D.C. upon receipt thereof.

By the Civil Aeronautics Board:

EDWIN Z. HOLLAND

Secretary

(SEAL)

EXPLANATORY STATEMENT

Part 372a of the Board's Special Regulations (14 CFR Part 372a) 1/ governs the operation of Travel Group Charters (TGC). Essentially the part permits groups of 40 or more persons having no "prior affinity" to hire all or part of an aircraft for round-trip transportation provided the group is formed at least ninety days in advance of the flight departure date, and each participant pays at least a twenty-five percent non-refundable deposit. The actual cost of the trip is to be borne by the participants on a pro rata basis. The part authorizes the performance of charter flights by both U.S. and foreign direct air carriers in connection with foreign-originating as well as U.S.-originating TGC's, subject to compliance with the various conditions and restrictions set forth therein.

In adopting Part 372a, the Board had been motivated by the discrimination inherent in the "prior affinity" concept, and the fact that our existing rules had proven to be extremely difficult to enforce. These concerns as to the inherent failings of the "prior affinity" concept had been shared for some time by the regulatory authorities of many other countries. During the pendency of the rule making proceeding which culminated in the adoption of Part 372a, several participants had argued for the adoption of special rules with respect to foreign-originating TGC's, so as to permit such charters to be operated in conformance with

1/ SPR-61, adopted September 27, 1972, 37 F.R. 20808, October 4, 1972.

the originating country's rules governing TGC's (or counterpart charter concept, however designated), so long as the foreign country's rules were substantially similar to those prescribed by Part 372a. However, at the time the Board adopted Part 372a, no foreign country had as yet promulgated comparable charter rules, and the Board therefore considered it premature to attempt then to prescribe standards for determining whether another country's future rules would be substantially similar to ours. The Board did, however, express agreement in principle with the merits of the proposed "law of the country of origin" approach, and indicated its willingness to deal with this matter later, in light of future developments in the international air transportation community, and to take appropriate implementing action--by amending our rules, granting waivers, or otherwise--giving due consideration to the interests of the public and the various competing classes of carriers. 2/

Subsequent to the Board's adoption of its TGC rule and an announcement by the United Kingdom of its intention to adopt an Advance-Booking Charter (ABC) rule, embodying a comparable concept, representatives of the governments of the United States, Canada, and the 20 member states of the European Civil Aviation Conference (ECAC), met in Ottawa, Canada from October 17 to 19, 1972, and duly issued a joint Declaration of Agreed

2/ SPR-61, pp. 22-23 (mimeo).

Principles for North Atlantic Charter Flights (Ottawa Principles). The Ottawa Principles were developed as a means to establish, during a period of experimentation with non-affinity charter concepts, a generally agreed framework which would permit all North Atlantic countries to establish substantially similar rules which could be reciprocally recognized. For its part, the Department of State in announcing acceptance by the United States of the Ottawa Principles, expressed its willingness to undertake discussions with other interested authorities in order "to arrive at [a] mutually agreeable regime for particular bilateral traffic flows and to ensure fully reciprocal treatment for U.S.-originating TGC flights."[3/]

By now, a number of other foreign governments have adopted their own charter regulations, which are based upon the Ottawa Principles and incorporate restrictive features similar, but not identical, to those contained in Part 372a. Moreover, bilateral agreements have been concluded between the United States and some of those foreign governments, following discussions conducted in accordance with the above-described announcement of the State Department.

In light of the above, the Board believes that it would now be appropriate to propose amending Part 372a so as to authorize foreign air

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3/ See Department of State Press Release #296, dated December 1, 1972, containing the text of a letter from Deputy Assistant Secretary of State for Transportation and Telecommunications, Bert W. Rein, addressed jointly to the Chairman of the Canadian International Transport Policy Committee, Canadian Transport Commission, and the President of the European Civil Aviation Conference.

carriers holding section 402 permits, as well as all certificated U. S. air carriers, to perform foreign-originated TGC's or advance-booking charters, organized in compliance with the rules of the country of origin, so long as: (1) those foreign rules are substantially similar to ours, and (2) there is in effect, between the country of origin and the United States, a formal agreement with respect to the charterworthiness of such operations.

The Board has tentatively concluded that, in order for a foreign country's rules to be considered substantially similar to our own, they must embody, at a minimum, the following restrictions and conditions:

1. The participants in each TGC/ABC group must travel together on both the outbound and inbound portions of the trip.

2. Each TGC/ABC contract must cover at least forty seats.

3. The list of actual participants (i.e., persons contractually bound to pay for a specifically identified flight) in each TGC/ABC group must be filed with appropriate regulatory authorities at least ninety days in advance of flight departure.

4. If there is to be a list of "standbys" (i.e., eligible substitutes for participants) for a TGC/ABC, and if the cost of the TGC/ABC is prorated among participants, then the number of such standbys shall not exceed three times the number of participants; but if the cost to individual TGC/ABC participants is not prorated, then the number of standbys shall not be greater than the number of seats contracted for.

5. No person shall be added to a standby list within ninety days prior to flight departure.

6. If the cost of the TGC/ABC is prorated among participants, then standbys may be substituted for participants at any time prior to flight departure; but if the cost to individual TGC/ABC participants is not prorated, then standbys may not be substituted for participants within thirty days prior to flight departure.

7. If the cost of the TGC/ABC is prorated among participants, then no more than twenty percent of the participants in any TGC/ABC group may be persons whose names were included on the standby list for that TGC/ABC flight; but if the cost to individual TGC/ABC participants is not prorated, then no more than fifteen percent of the number of seats contracted for may be sold to persons whose names were on the standby list relating to such flight.

8. A TGC/ABC must be "round-trip" (i.e., including both a departure and return flight).

9. If the cost of the TGC/ABC is prorated among participants then a TGC/ABC must be for a minimum duration of at least seven days in the case of North American charters, and a minimum duration of at least ten days in the case of all other charters; but if the cost to individual TGC/ABC participants is not prorated, then during the period of April 1 to October 31, the TGC/ABC must provide for a minimum duration of at least fourteen days, and during the period of November 1 to March 31, the minimum duration must be at least ten days: Provided, however, That the minimum duration of non-prorated North American TGC/ABC's need not be greater than seven days.

10. If the cost of the TGC/ABC is prorated among participants, then commingling of TGC/ABC groups with other categories of charter traffic is permitted, but if the cost to individual TGC/ABC participants is not prorated, then no commingling of TGC/ABC groups with other categories of charter traffic shall be permitted.

11. The direct air carrier shall maintain a list of the passengers actually carried on each TGC/ABC flight.

Our proposal to recognize the charterworthiness of foreign-originated TGC/ABC's operated pursuant to the rules of the country of origin so long as those rules embody the above-listed restrictions is grounded on our tentative conclusion that the proposed special rules will maintain, as our present rules have recently been held to maintain, "the necessary distinction between group and individually ticketed travel. . . ."[4/]

Although the minimum conditions which we are proposing to prescribe for foreign TGC/ABC rules include some which are less restrictive than those which we have imposed on U.S.-originating TGC's, others are included which are more restrictive than those presently contained in Part 372a. Viewed as a whole, we tentatively find that the cumulative effect of the various restrictions which we propose herein would be "to insure that charter travel [does] not become a guise for individually ticketed services."[5/]

In reaching our conclusion to modify the inbound charter rules, we have given great weight to the fact that the pro rata characteristic of our TGC rule appears to be unacceptable to a number of foreign governments for charters originating in their territory. Our insistence on this one requirement, regardless of the country of origin or the flag of the carrier, could thus result in effectively aborting the TGC experiment. Moreover, as a general principle, we are mindful that the international aviation system cannot

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4/ Saturn Airways, Inc. v. CAB, No. 72-1904, D.C. Cir., July 11, 1973, at 19.
5/ Id., at 21.

maintain its viability if every government rigidly insists on imposing its own regulatory concepts on other sovereign states. Our approach here, which is designed, as a matter of comity, to recognize the validity of rules of foreign governments for charters originating in their territory, while maintaining our own rules for charters originating in this country, represents a reasonable accommodation of the divergent viewpoints of various sovereign members of the international aviation community in dealing with a common problem.

The proposed rules should generally enable inbound TGC/ABC charters to be operated from all countries with which the United States has concluded a formal agreement with respect to the charterworthiness of this new class of charters. These agreements have thus far included, and future agreements are expected to include, a stipulation that the subject rules of the signatories are "substantially similar." To the extent that the rules of a particular foreign signatory may embody variations which do not completely comply with our proposed restrictions, authority to operate charters under such foreign rules would have to be obtained by waiver, pursuant to §372a.3.

Finally, we are proposing a technical amendment to §372a.31, which would impose on TGC organizers who organize foreign-originated TGC/ABC flights certain requirements as to retention and disclosure of relevant records which will enable us to determine whether the rules of the country of origin are actually being followed.[6/]

6/ The attached proposed rule also includes technical revisions of the definitions of "travel group charter" and "travel group charter organizer" in §372a.2 so as to conform to the proposed substantive amendments, and would eliminate from the definition of the latter term certain substantive material, which would become incorporated in §372a.22.

PROPOSED RULE

It is proposed to amend Part 372a of the Special Regulations (14 CFR Part 372a) as follows:

1. Amend the Table of Contents by adding a new Subpart F, the Table as amended to read in part as follows:

SUBPART E - REPORTING REQUIREMENTS

Sec.

372a.50 Reporting requirements.

SUBPART F - FOREIGN-ORIGINATING TRAVEL GROUP CHARTERS

372a.60 Foreign-originating travel group charters.

2. Amend the definitions of "travel group charter" and "travel group charter organizer" in §372a.2 to read as follows:

§372a.2 Definitions.

As used in this part, unless the context otherwise requires--

* * * * *

"Travel group charter" means a round-trip charter to be performed by one or more direct air carriers which is arranged and sponsored by a charter organizer for a travel group and which meets the requirements set forth in §§372a.10 or 372a.60, whichever is applicable.

"Travel group charter organizer" means (1) any citizen of the United States, as defined in section 101(13) of the Act (other than a direct air carrier), who is authorized hereunder to engage in the formation of travel groups in accordance with the provisions of this part; or (2) a foreign charter organizer.

3. Amend §372a.22 by adding, as a new paragraph (e), matter deleted hereinabove from §372a.2, the section, as amended, to read as follows:

§372a.22 Operating authorization of charter organizer.

* * * * *

(d) On and after May 30, 1973, * * *

(e) With respect to the charter contract, such charter organizer acts solely as agent for, and holds all moneys received from any source in connection therewith as agent for, the members of the travel group.

4. Amend §372a.31 by inserting, following paragraph (a) a new paragraph (a-1), and by revising paragraph (b), the entire section, as amended, to read as follows:

§372a.31 Record retention. 6/

(a) Every charter organizer (other than a foreign charter organizer over whom the Board has declined to exercise its jurisdiction) conducting a travel group charter pursuant to this part shall retain for 2 years after completion of the charter or series of charters true copies of the following documents at its principal or general office in the United States (or, if it is a foreign charter organizer, then at its principal or general office):

(1) All documents which evidence or reflect deposits made by, and

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6/ Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals, or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious, or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious, or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both. Title 18, U.S.C. §1001.

refunds made to, each charter participant;

(2) All statements, invoices, bills, and receipts from suppliers or furnishers of goods and services in connection with the travel group charter or series of charters.

(a-1) Every charter organizer (other than a foreign charter organizer over whom the Board has declined to exercise its jurisdiction) conducting a travel group charter pursuant to Subpart F of this part shall retain for 2 years after completion of the charter at its principal or general office in the United States true copies of all documents which it is required by the applicable rules of the originating country to file with the regulatory authorities of that country or to maintain in its own files for any specified period.

(b) Every such charter organizer shall make the documents required to be retained by the provisions of the foregoing paragraphs (a) or (a-1), as the case may be, available upon request by an authorized representative of the Board and shall permit such representative to make such notes and copies thereof as he deems appropriate.

5. Amend §372a.40 to read as follows:

§372a.40 Charter not to be performed unless in compliance with part.

A direct air carrier shall not perform air transportation in connection with a travel group charter unless it has made a reasonable effort to verify that all provisions of this part have been complied with (or, if it is a foreign-originated charter to which Subpart F applies, that all provisions of

the rules of the country of origin have been complied with), and that the charter organizer's authority under this part has not been suspended by the Board (or, if it is a foreign-originated charter to which Subpart F applies, that the charter organizer's authority has not been suspended by the regulatory authorities of the country of origin): Provided, however, That except with respect to foreign-originated charters operated pursuant to Subpart F of this part, where a travel group is organized by a foreign charter organizer over whom the Board has declined to exercise its jurisdiction pursuant to §372a.20a, no direct air carrier may perform air transportation in connection with such travel group charter unless the charter is formed and implemented in accordance with the general conditions and limitations set forth in Subpart B of this part and the charter organizer performs all the acts and duties which this part requires to be performed by charter organizers within the Board's jurisdiction, other than the provisions set forth in §§372a.22(b)(4)(iii), 372a.25 and 372a.31.

6. Amend Part 372a by adding a new Subpart F to read as follows:

SUBPART F - FOREIGN-ORIGINATING TRAVEL GROUP CHARTERS

§372a.60 Foreign-originating travel group charters.

(a) Notwithstanding the general conditions and limitations set forth in Subpart B of this part or the conditions set forth in §§372a.22, 372a.25, 372a.27 through 372a.30, 372a.31(a)(1) of Subpart C of this part, or the prohibitions set forth in §372a.41 and 372a.42 of Subpart D of this part, or the reporting requirements set forth in Subpart E of this part, direct air carriers and charter organizers (other than a foreign charter organizer over whom the Board has declined to exercise its jurisdiction) are authorized to operate and organize foreign-originating

travel group or advance-booking charters (referred to herein as TGC/ABC) in compliance with the applicable rules of the originating country, so long as (1) such foreign rules conform to paragraph (b) of this section, and (2) there is in effect a formal agreement between the originating country and the United States with respect to the charterworthiness of such operations.

(b) The following are the restrictions and conditions to which foreign rules must conform in order for direct air carriers and charter organizers to operate and organize foreign-originating TGC/ABC charters pursuant to paragraph (a) above:

(1) The participants in each TGC/ABC group must travel together on both the outbound and inbound portions of the trip.

(2) Each TGC/ABC contract must cover at least forty (40) seats.

(3) The list of actual participants (i.e., persons contractually bound to pay for a specifically identified flight) in each TGC/ABC group must be filed with appropriate regulatory authorities at least ninety (90) days in advance of flight departures.

(4) If there is to be a list of "standbys" (i.e., eligible substitutes for participants) for a TGC/ABC, and if the cost of the TGC/ABC is prorated among participants, then the number of such standbys shall not exceed three times the number of participants; but if the cost to individual TGC/ABC participants is not prorated, then the number of standbys shall not be greater than the number of seats contracted for.

(5) No person shall be added to a standby list within ninety (90) days prior to flight departure.

(6) If the cost of the TGC/ABC is prorated among participants, then standbys may be substituted for participants at any time prior to flight departure; but if the cost to individual TGC/ABC participants is not prorated, then standbys may not be substituted for participants within thirty (30) days prior to flight departure.

(7) If the cost of the TGC/ABC is prorated among participants, then no more than twenty percent of the participants in any TGC/ABC group may be persons whose names were included on the standby list for that TGC/ABC flight; but if the cost to individual TGC/ABC participants is not prorated, then no more than fifteen percent of the number of seats contracted for may be sold to persons whose names were on the standby list relating to such flight.

(8) A TGC/ABC must be "round-trip" (i.e., including both a departure and return flight).

(9) If the cost of the TGC/ABC is prorated among participants, then a TGC/ABC must be for a minimum duration of at least seven days in the case of North American charters, and a minimum duration of at least ten days in the case of all other charters; but if the cost to individual TGC/ABC participants is not prorated, then during the period of April 1 to October 31, the TGC/ABC must provide for a minimum duration of at least fourteen days, and during the period of November 1 to March 31, the minimum duration must be at least ten days: Provided, however, That the minimum duration of a

non-prorated North American TGC/ABC need not be greater than seven days.

(10) If the cost of the TGC/ABC is prorated among participants, then commingling of TGC/ABC groups with other categories of charter traffic is permitted, but if the cost to individual TGC/ABC participants is not prorated, then no commingling of TGC/ABC groups with other categories of charter traffic shall be permitted.

(11) The direct air carrier shall maintain a list of the passengers actually carried on each TGC/ABC flight.

APPENDIX C

THE WHITE HOUSE

Washington

June 22, 1970

MEMORANDUM FOR:

THE SECRETARY OF STATE
THE SECRETARY OF DEFENSE
THE SECRETARY OF THE TREASURY
THE SECRETARY OF COMMERCE
THE SECRETARY OF TRANSPORTATION
THE ATTORNEY GENERAL
THE CHAIRMAN, CIVIL AERONAUTICS BOARD

I have approved the attached Statement of International Air Transportation Policy, which was prepared by the Interagency Steering Committee established in August of 1969 and which I forward as policy guidance for the execution of your responsibilities in the area of international air transportation.

/S/

Richard Nixon

STATEMENT OF INTERNATIONAL AIR TRANSPORTATION POLICY

Public policies operate in a steadily changing technical, economic, and social environment. For sustained progress toward broad national goals we must reexamine our policies regularly to assure that relevant changes are taken into account. This is especially important in fields like international air transportation, where changes are rapid.

United States policies with regard to international air transportation were last given comprehensive review in 1962-63, as high capacity jet aircraft were coming into service. In the meantime, international aviation has expanded greatly. This dramatic growth has generated new policy questions and changed the dimensions of others. Renewed attention must now be paid to such problems as airway and terminal congestion, the liability of carriers for passengers and cargo, and the cost burden of the facilities needed for safe international flight. Our policies with regard to competition need reappraisal in the light of the substantially expanded market for international services, and its projected further growth. This market has now warranted certification of two United States round-the-world carriers. It has sustained the recent strong traffic growth of the United States supplemental airlines. It is the type of market which attracted an unprecedented eighteen United States carrier applications for route awards in the Transpacific case. At the same time, it is a market in which prospects of excess capacity or other dislocations are seen from various quarters, and these concerns are made the more acute by the appearance of the wide-bodied jets and anticipation of supersonic aircraft.

The present review of United States international air transportation policy is an effort to take account of current conditions, and the prospective circumstances of the 1970's, in a way which best serves our fundamental interests in international air transport. These interests, as expressed in the Department of Transportation Act of 1966 and the Federal Aviation Act of 1958, are (1) to promote international air transportation that is "fast, safe, efficient and convenient ... at the lowest cost consistent therewith and with other national objectives, including the efficient utilization and conservation of the nation's resources" and (2) to encourage and develop "an air transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the postal service, and of the national defense."

Clearly, such a policy must seek to achieve a number of objectives and take into account a number of constraints. It must aim to develop and maintain a sound system of international air transportation that carries people and goods safely, efficiently, and economically. It should promote an expanding, innovative, economically and technologically

efficient international air transport system which (1) provides that passengers and shippers share in the benefits through improved service and reduced fares and (2) assures U.S. air carriers a fair and equal opportunity to compete in world aviation markets so as to maintain and further develop an economically viable service network wherever a substantial need for air transportation appears.

These purposes cannot be realized until aircraft hijackings are stopped. By any standard, air piracy is reprehensible. We support measures designed to end this terrible practice.

Our international air transportation policy must recognize a number of other U.S. objectives or principles; these may at times be served by the policy or at times be constraints upon it. Thus, the policy must be appropriately mindful of U.S. strategic and political interests, the international military air transportation interests of the U.S., and the prospective effect of the policy on the U.S. balance of payments. It must take into account legitimate air transport interests of other countries and recognize that in the final analysis the policy cannot be viable without international acceptance. It should recognize that the United States historically has believed that the economic and technological benefits we seek can best be achieved by encouraging competition (the extent of competition to be determined on a case-by-case basis) and by a relative freedom from governmental restrictions. The policy must also reflect our concern about the quality of the environment, and our determination that adequate efforts are made to preserve and enhance that quality as we continue to develop the technology of air transportation.

Proceeding from the premises set out above, our review has led us to the following conclusions with regard to the central aspects of this nation's international air transportation policy.

1. <u>The Exchange of Air Transport Rights</u>

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2. <u>Charter Operations and the Role of Supplemental Carriers in Relation to Scheduled Services</u>

Since 1963 international charter services by scheduled and supplemental carriers have grown in importance, have been increasingly accepted by the public, and now form an integral part of some markets. While the roles of scheduled and supplemental carriers are different as described in this Statement,

there has nonetheless developed in certain areas competition between them. This may, indeed, increase.

We expect both scheduled services (individually ticketed and individually waybilled) and charter services (whether offered by supplemental carriers or scheduled carriers) to have important roles throughout the coming decade. The growth rates of both services make it appear likely that both will have substantial markets.

Scheduled services are of vital importance to air transportation and offer services to the public which are not provided by charter services. Only scheduled services are expected to offer regular and dependably frequent schedules, provide extensive flexibility in length of stay, and maintain worldwide routes, including routes to areas of low traffic volume. Substantial impairment of scheduled services could result in travelers and shippers losing the ability to obtain these benefits. Accordingly, in any instances where a substantial impairment of scheduled services appears likely, it would be appropriate, where necessary to avoid prejudice to the public interest, to take steps to prevent such impairment.

Charter services by scheduled and supplemental carriers have been useful in holding down fare and rate levels and expanding passenger and cargo markets. They offer opportunities to exploit the inherent efficiency of planeload movement and the elasticity of demand for international air transport. They can provide low-cost transportation of a sort fitted to the needs of a significant portion of the traveling public. Charter services are a most valuable component of the international air transportation system, and they should be encouraged. If it appears that there is likely to be a substantial impairment of charter services, it would be appropriate, where necessary to avoid prejudice to the public interest, to take steps to prevent such impairment.

Additional uniformity and simplification of charter rules is desirable, and an effective charter enforcement program should be maintained.

Both scheduled carriers and supplemental carriers should be permitted a fair opportunity to compete in the bulk transportation market. We consider passengers traveling at group rates on scheduled services to be part of that market. Regulatory and promotional policies should give greater recognition to the dimensions, characteristics and needs of the bulk transportation market, as such, and less emphasis to the type of carrier that is serving that market. However, the Government should not allow enjoyment of the right to perform both scheduled service and charter service to result in decisive competitive advantages for scheduled carriers.

Licensing tools (geographic limitations, charter definitions, volume restrictions, etc.) can be utilized to adjust the competition between scheduled services and charter services. However, the widespread public acceptance of charters warrants care in taking any restrictive actions. A determination whether to impose restrictions upon charter services should consider principally the extent to which the ability to obtain frequent and regular travel would otherwise be prejudiced. If it is necessary to restrict charter services because it is found that only scheduled service can provide the required convenience, and it is the charter services that make impossible the maintenance of the scheduled service, the restrictions should be the minimum necessary to have the required effect.

The foreign landing rights for charter services should be regularized, as free as possible from substantial restriction. To accomplish this, intergovernmental agreements covering the operation of charter services should be vigorously sought, distinct, however, from agreements covering scheduled services. In general, there should be no trade-off as between scheduled service rights and charter service rights. In negotiating charter agreements, the continuation of and the nature of the charter rights of foreign carriers will be at issue.

3. Rates and Fares and the Role of the International Air Transport Association (IATA)

Under existing United States policy the Civil Aeronautics Board has permitted U.S. carrier participation in IATA subject to various conditions and disciplines. Within that framework the Board has encouraged pricing policies, including experimentation with promotional fares, which would make air services available on the lowest economic basis to the widest possible market. To this end, the Board has also encouraged aggressive and free competition in charter pricing by the supplemental carriers.

This approach has been successful in the past five years in bringing about substantial improvement in the level and structure of North Atlantic fares, and traffic growth has been rapid. However, IATA has not made similar progress on North/Central Pacific routes, where normal fares remain well above justifiable levels and there are no individual economy class excursion fares or certain other promotional fares comparable to those in effect across the North Atlantic. The Board is handicapped by its lack of authority to regulate international rates, authority which other governments assert.

The U.S. should work for the broadest range of potentially profitable services designed to appeal to the broadest consumer market and based on the lowest cost of operating an efficient air transport system.

Innovative experimentation with promotional fares and varying service concepts should be encouraged to take full advantage of technological developments.

The U.S. should continue to accept IATA as the machinery for pricing scheduled services, subject to continuing safeguards, but supplemented by increased direct informal exchanges between governments. Continued support should also be given to the establishment of IATA and non-IATA charter rates on a free competitive basis. The effectiveness of the Board in its dealings both with IATA and governments should be enhanced by vesting it with authority to regulate rates and fares between the U.S. and foreign points, subject to Executive review. 1/

4. Competition Among and Between U.S. Carriers and Foreign Carriers

Competition among air carriers, as in other areas of economic activity, tends to improve the quality and variety of service to the public, keeps prices reasonable, and enlarges the market for all carriers. The concept of a single carrier or chosen instrument for the United States remains as undesirable today and in the future as in the past.

The United States should maintain a flexible policy on certificating competition among U.S. carriers on international routes. This policy should take into account the public's need for additional or improved air services, including new direct services, including new direct services from U.S. points other than major gateways and improved service to points abroad where this is necessary to meet the challenge of changing market patterns. At the same time, our policy on competition must take account of the economic viability of the additional or improved air services, including a consideration of the probable foreign carrier competition and the new factors of charter competition and wide-bodied jets. The policy should also distinguish between point to point competition of U.S. carriers and services to a particular

1/ Since 1966, the CAB has favored Executive notification rather than Executive review.

foreign country from different sections of the U.S. Within this framework, there may be future route possibilities for new U.S. carriers, as well as incumbent carriers.

Every effort should be made to improve U.S. carrier competitive performance vis-a-vis foreign flag carriers in some markets, particularly the North Atlantic. Continuing to improve the quantity and variety of services in such markets would enhance our competitive standing. U.S. carriers should adequately serve the international routes for which they are certificated. All appropriate U.S. Government agencies should cooperate with the CAB in developing criteria and procedures to assure that the public convenience and necessity is served. The result should be improved U.S.-flag service and a general increase in economic efficiency which in the final analysis could be translated into lower costs to the public and should result in an improvement in the United States carriers' competitive standing in international air transportation markets.

Generally, economic cooperative arrangements such as revenue or traffic pools between U.S. and foreign air carriers are anti-competitive and as a rule should continue to be discouraged. The United States should continue its flexible policy with respect to other forms of economic cooperative arrangements, such as blocked-space agreements, when these are shown to be in the public interest, improve the air service network, and otherwise meet U.S. international aviation policy objectives.

The United States recognizes that significant benefits to the public can and do result from competition by foreign air carriers. It is important, however, to assure that this competition is fair, non-discriminatory, and in keeping with the provisions of our air transport agreements. There is some evidence that the incidence of air services by foreign air carriers from points behind their home countries may continue to increase. This situation should be kept under review and appropriate consultative and other steps taken as necessary.

5. <u>All-cargo Certification and Rights</u>

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6. <u>Carrier Liability</u>

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8. Facilitation

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9. User Charges, Fees and Taxes

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10. Balance of Payments

U.S. policy on international air transportation, as in numerous other areas, must give especially close attention and careful consideration during the 1970's to potential effects on the balance of payments.

This will require, first and foremost, an active and on-going balance-of-payments consciousness on the part of all agencies concerned.

A second major requirement is that it must reflect a balanced and comprehensive assessment of potential policy effects on the three major payments accounts which are directly affected by international air transport activities--air transportation, overseas travel, and aircraft exports--as well as the effects of air cargo policies on the foreign trade account generally. In carrying out such assessment, the most important point to be kept in mind is that by far the largest part of the possible effects of air transport policies on all three of these accounts must be expected to relate to, and result directly from, their expected influence on the general growth rate of total international passenger traffic and/or the relative numbers of American, as compared with foreign, travelers making up this total traffic.

Taking account of these balance-of-payments considerations while, at the same time, recognizing the importance of encouraging economically sound growth of air transport activities as a basic objective of U.S. aviation policy, the following further guidelines are also recommended.

U.S. air transport policy during the 1970's should recognize that actions which improve the U.S. flag share of international air traffic also provide some benefit to the U.S. payments.

It should also make a continuing effort (in conjunction with, and support of, other Government and private-sector efforts on this subject) to give some extra stimulus to a faster growth of inbound, relative to outbound, travel by: maintaining a margin of necessary flexibility for, and giving sympathetic and imaginative consideration to various possible means of providing limited directional encouragements. This is especially desirable when incremental costs are lower in a given direction.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing brief by causing copies thereof to be mailed in a properly addressed, franked envelope to the following:

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